

74-7079

19 December 1974

MEMORANDUM FOR THE RECORD

SUBJECT: Meeting with the Murphy Commission to Discuss
William R. Harris' Issue Paper

1. At the request of the Commission on the Organization of the Government for the Conduct of Foreign Policy (Murphy Commission), I met with the Commission on 16 December to go over certain legal and legislative matters which had been put in an issue paper for them. (Copy attached.) Mr. Lawrence Houston had also been invited. Present from the Commission were Robert D. Murphy, Chairman; Dr. David M. Abshire; William J. Casey; and staff members Francis O. Wilcox, Fisher Howe, and Thomas J. Reckford. Also present was William R. Harris, who had prepared the basic submission to the Commission entitled "Legal Authority for the Conduct and Control of Foreign Intelligence Activities." The Chairman requested that I comment on the issues paper.

2. Issue 1: "Should the Commission emphasize that the intelligence community must comply with the laws of the United States?"

The paper referred to prior intelligence activities of questionable legality, citing the "Huston Plan" and assistance to the White House "plumbers." There were three options specified: (a) that the Commission viewed current intelligence activities as in conformance with the law; (b) to reaffirm the importance of compliance with the law; and (c) to say nothing. I indicated that option (a) certainly was suitable from our viewpoint and, furthermore, was true. I pointed out that Tom Huston had testified regarding the Agency's participation in the "Huston Plan" before the Senate Armed Services Committee to the effect that the recommendation made with respect to CIA in the "Huston Plan" was simply that CIA increase its coverage of foreign activities.

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3. Issue 2: "Is additional or clarifying legislation desirable for the conduct or control of foreign intelligence activities? "

"a. to enhance criminal sanctions for unauthorized disclosure of intelligence sources and methods"

We discussed sources and methods legislation in some detail, pointing out the Director's strong view that criminal sanctions are needed in view of the inadequacy of existing law. William Harris agreed that legislation was desirable but seriously questioned whether we should seek an injunction. I pointed out that we strongly favored an injunction and this had been concurred in by the Department of Justice. I added that there were some other questions that we were still working with Justice on and, furthermore, I would be working more with Mr. Harris. It was suggested to the Commission that its position could well be that it supported sources and methods legislation without endorsing any particular version of such legislation.

"b. to establish the National Security Agency as an independent agency"

I indicated we took no strong position on legislation to establish NSA as an independent agency, but queried what this would accomplish. It was also indicated that this might not be the time for congressional review of NSA's activities in detail as would undoubtedly occur if legislation were sought.

"c. to authorize collection of information about multinational entities"

I indicated the Agency saw no need for this legislation since we were authorized under existing law and directives to secure such foreign intelligence.

"d. to establish standards for domestic or transnational collection of intelligence"

It was indicated that we saw no need for legislative standards in this area. Harris indicated he had been informed

by the NSA General Counsel that such legislation was necessary. (I am certain that he has garbled some legal problems in connection with transnational intelligence arising out of inadvertent surveillance of Americans followed by discovery motions in subsequent prosecutions.

"e. to balance the duties of the DCI for the protection of sources and methods with the duty to supervise declassification of foreign intelligence information. "

It was pointed out that E. O. 11652 deals with declassification. Further, the new Freedom of Information Act provides for declassification reviews and any additional legislation for the DCI in this area was simply unnecessary and unwarranted.

4. Issue 3: "What changes in the statutory authority for the clandestine services should be sought? "

a. We reviewed the votes on the riders to prohibit covert action by the CIA in the House and the Senate. Further, we pointed out that Justice ruled that such actions are legal. Also, we pointed out the House and Senate versions of the Foreign Assistance Act, which is still in conference and has riders requiring Presidential determinations and reports to Congress. Thus, there was ample legal authority in our view.

b. We argued that a law on this subject is simply not required. There are differences among lawyers as to where international treaty obligations would prohibit certain types of covert action. I explained that we had taken the position that the President's inherent authorities as Commander in Chief and also under international law as a sovereign took precedent. Further, there was a recent legal opinion by the State Department, concurred in by the Secretary of State and the Attorney General, that the Vienna Convention on the status of diplomats and embassies did not affect espionage activities.

c. In addition to the stated requirement, Mr. Harris also offered the suggestion that the DDO should have its own legal counsel so that covert actions would be more thoroughly

scrutinized. We took the position that there is no requirement for formal legal opinions as to covert actions since fundamentally these are basic policy questions. As to the suggestion for a separate counsel for the DDO, I stated that the DDO can receive legal review now if it is desired and there seems to be nothing gained by statutorily requiring legal opinions.

5. It appeared throughout that the Commission members were much in accord with views that we expressed. Particularly Chairman Murphy was of the view that if our legal authorities are clear and about which he saw no problem, the less precise one became in law about these matters, the better. All members commented on what they termed an excellent presentation. I think it reasonably clear that these Commission members are not going to have much patience with Mr. Harris' papers and views.



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JOHN S. WARNER
General Counsel

Attachment

cc: DCI
DDCI
DDO
AD/DCI/IC
General Counsel, NSA

COMMITTEE II - Intelligence

ISSUES PAPER

STATUTORY AUTHORITY

1. Issue: Should the Commission emphasize that the intelligence community must comply with the laws of the United States?

Although all government agencies must perform in accordance with U.S. law, there have been instances in the past few years where one or more intelligence agencies have engaged in conduct of questionable legality (e.g., approving the "Huston Plan" or giving improper assistance to White House "plumbers"). Urging compliance with the law might be welcomed in some quarters and might add to the effectiveness of American foreign policy by increasing public confidence in the institutions of government.

Essentially, the available options are (a) to state satisfaction that intelligence activities, as delegated by NSC intelligence directives and other executive authority, are conducted in accordance with U.S. law, (b) to reaffirm the importance of compliance with the law or (c) to say nothing about this subject.

2. Issue: Is additional or clarifying legislation desirable for the conduct or control of foreign intelligence activities?

A number of areas possibly needing new legislation have been suggested. The most important of these appear to be:

- a. to enhance criminal sanctions for unauthorized disclosure of intelligence sources and methods
- b. to establish the National Security Agency as an independent agency
- c. to authorize collection of information about multinational entities
- d. to establish standards for domestic or transnational collection of intelligence
- e. to balance the duties of the DCI for the protection of sources and methods with the duty to supervise declassification of foreign intelligence information.

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3. Issue: What changes in the statutory authority for the clandestine services should be sought?

(Note: This issue relates to the Committee's separate consideration of various aspects of clandestine activity).

Among the available options are (a) to revise the National Security Act to make more explicit the subject of clandestine activity, (b) to urge compliance with international treaty obligations of the U.S., (c) to require formal legal opinions within the NSC or Department of State prior to authorizations of covert action by the NSC, or otherwise to assure that clandestine services are compatible with international legal obligations.

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2 December 1974

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MEMORANDUM FOR THE RECORD:

SUBJECT: DCI Appearance before Murphy Commission, 18 November 1974

PRESENT: Ambassador Robert Murphy
Mr. Arend D. Lubbers
Congressman Peter Frelinghuysen
Mr. William J. Casey
Dr. David Abshire
Dean Francis Wilcox
Mr. Fisher Howe
Mr. Thomas Reckford
Mr. Kent Crane
Mr. Frank C. P. McGlinn

1. In general the Director outlined a historical perspective of covert action (CA) activity with examples through the past 20 years. He traced the combining of OSO/OPC in the early 1950's and the condition of CA activities in CIA today ()

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2. Specifically, in response to Ambassador Murphy's questions on authority and oversight in the past, the Director cited the OCB, 5412, 303 Committee and the current 40 Committee role. He noted that U.S. policy governing CA activities was clear in the period of the 50's and 60's but that a shift of emphasis over the period has occurred.

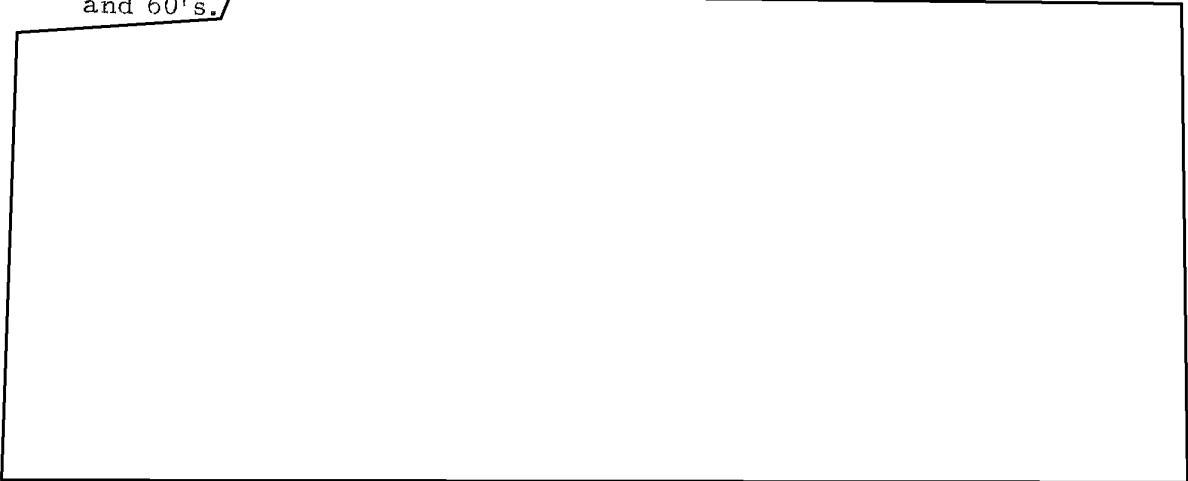
3. In response to Mr. Casey's question concerning the relationship of CIA's role in positive intelligence to covert action, the Director read from and elaborated on the CIA law. He outlined how agents are recruited primarily for positive intelligence coverage and can be used as policy dictates to launch a CA activity and be expanded as in the case of Vietnam.

4. The Director continued an outline of the types of CA by citing CIA involvements in international organizations up to the 1967

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25X1 expose. He noted these were representative of early policy initiatives to fight Communist dominance of these international groups in the 50's and 60's.



5. The Chairman inquired whether Congress reviewed CA activities, specifically referring to Chile. He also inquired if a record is kept. The Director explained his regular reporting to selected committees and the circumstances surrounding the Chile revelations by Congressman Harrington. He noted that a record was kept of some Congressional sessions and that in general he favored recording "since memories dim and perceptions can change." He noted that the record of Congress for keeping secrets is good -- the Harrington exception being one the Foreign Affairs Committee in the House is addressing.

6. The Director then explained the concept of plausible denial using Laos and Cuba as cases in point. He noted the constraints of size on secrecy and that "plausible denial" has become outmoded and contentious in today's environment. He noted those words are not used now and that questions concerning CA revelations must be answered honestly to the American people.

7. Mr. Lubbers asked the Director to analyze reason for Cuban failure. The Director observed that size impacted on control and security and that in keeping operations tight, there may not have been in the case of Cuba enough exposure to assessment people. He also cited time constraints in getting ready landing forces and some lack of momentum. Lastly, he cited how failure to eliminate the Cuban air force may have been a material factor.

- 2 -

intelligence operations. The Director urged the Commission to give thought to this issue in preparing its report.

- 3 -

8. Mr. Abshire noted secrecy seemed to have prevented incremental changes in the operation getting policy consideration. The Chairman observed the State Department was fully informed and cited Mr. Acheson's position re Cuban air strikes on which the Agency did not appeal to President Kennedy. Mr. Wilcox inquired whether clandestine collectors were involved in the Cuban project. The DCI responded affirmatively but noted the estimators were not. Congressman Freylinghuysen observed that the papers knew something was up among Cuban refugees and that it was not a secret.

9. The Director outlined the principle of using CIA to get activity started -- then shift them to other agencies. This is true especially for technical programs but also a reasonable course for large paramilitary CA activity. He explained why this had not been done in case of Laos. He noted that funding and logistics were carried out by DOD after 1968.

10. Dr. Abshire opined that Laos was a good effort. He observed that it was unfortunate the perception of a "secret" war occurred. The Director noted that U.S. policy emphasized Laos as a national state, and the political issues required direct U.S. involvement be avoided in any case.

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16. Congressman Freylinghuysen asked the DCI if the Commission could help on any other subjects. The DCI restated his view that the Commission could accent the role of intelligence and support it as an important tool for de-escalating issues.

17. Mr. Nelson, in urging support to the DCI's proposed legislation, cited Soviet efforts to reveal CIA people and commented on Agee's book and his ostensible tie with Cubans.

18. Mr. Lubbers advised that the perception of people in his part of the country is that intelligence is still engaged in cold war. DCI noted in response to Mr. Lubbers that superanimated Howard Hunts are not the case today. He reported on technical advances of Soviets and their efforts to turn off access of our technical collectors.

19. Dr. Abshire noted that the group the Commission covered in Atlanta during the past week emphasized keeping CA capabilities on a standby activity only. He observed that in our society it probably is not possible to do CA and keep it a secret. The DCI observed this is the focal issue in today's America - secrecy which is prime to operations. Related to this, the DCI noted the need for legislation to protect intelligence sources and methods from revelation by those within the secret. On question from the Chairman, the DCI observed that the British law is incompatible with the American scene. He urged the Commission's support to legislation being introduced on this matter.

20. Mr. Lubbers inquired about 40 Committee oversight. The DCI described the 40 Committee charter and review process. He noted some CA is directly responsive to Presidential direction, but except for these few cases he explained the 40 Committee is involved and kept informed. The nature of

proposals for 40 Committee review and the degree of prior consultation with Ambassadors, Assistant Secretaries, etc. were described. The Director reported on his recent briefing to the Congress on current CA projects. He also cited the PFIAB as a further independent oversight group.

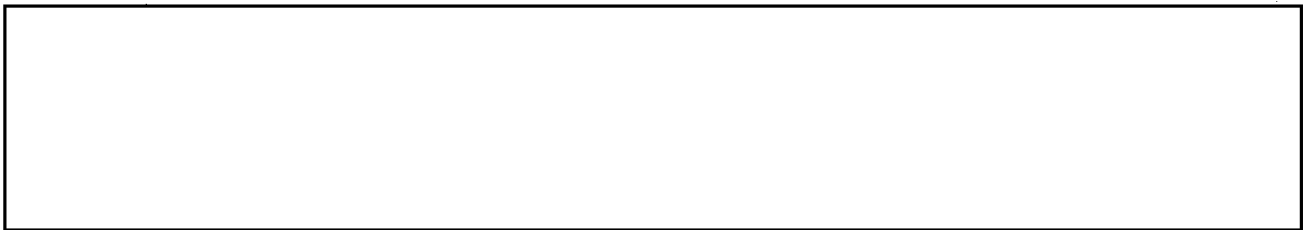
21. The Chairman inquired how detente impacted on intelligence operations. He observed that Americans seem to feel we can relax. The DCI observed that detente is a relationship between two countries which can destroy each other while intelligence is an intellectual process of assessment as well as collection and CA which can contribute to detente.

22. The Chairman then circulated the Commission and staff for questions.



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24. Dr. Abshire pursued 40 Committee oversight, and observed that the idea that CIA is a state within a state needs to be addressed, noting it is a real perception among many he has talked to.



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26. Howe inquired about overt reporting. DCI elaborated his efforts to get improved Foreign Service reporting and mentioned his intention of sending an evaluation feedback annually to some Ambassadors on their intelligence reporting. Howe reported that the Commission has a contract out to review four embassies and indicated he would provide DCI with the results. (Subsequently followed up.)

27. Mr. Lubbers inquired of DCI's role as coordinator and whether structural changes were needed. DCI responded by elaborating his role and observed it was working well.

28. Mr. Lubbers inquired whether CA could be a bargaining chip in detente. DCI noted we needed a fundamental Soviet attitudinal change.

29. Mr. Lubbers inquired whether a Joint Committee would be useful. DCI noted no objection -- explained present adjustments under way in Congress -- deferred to Congress since "it is their affair to determine how they wish to exercise oversight."

30. Mr. Lubbers observed that economic intelligence involvement would increase. DCI elaborated on CIA economic research, sources of data for analysis emphasizing that clandestine sources should be used only where overt sources cannot do the job.

31. Congressman Freylinghuysen indicated Chinese visits were helpful to him. DCI noted his desire to make intelligence analysis known to Congress, press, and others wherever he can do so.

32. Messrs. McGlinn and Casey had no questions.

33. Crane inquired what triggered CIA to move issue to 40 Committee. DCI referred to NSDM 40 -- reading from it. He noted 40 Committee was primarily for substantive CA but also covered peripheral flights and overflights.

34. Reckford observed contentions about ineffectiveness of 40 Committee and "Henry's firm hand." DCI noted each rep had a responsibility to speak up if he disagrees.

35. Howe inquired whether there were other things 40 Committee should review, i.e., operations. The Director replied that he is responsible to the President for clandestine operations and keeps the Secretary of State fully advised. He noted he would not expect the 40 Committee to review all clandestine operations and sees no need for it to do so.

36. Crane observed that detente should help access to hard targets. Nelson concurred, especially younger Soviets.

37. Crane suggested Embassy styled to collect intelligence should be consideration in appointing Ambassador. Murphy said he was impressed with Soviets in U.S. Did CIA track? DCI stated this was an FBI chore.

38. Howe questioned how much Commission should get into clandestine HUMINT. He commented on the PFIAB overall HUMINT report. He suggested

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39. Howe asked for DCI comments on separating CA from DDO and/or separating DDO from the Agency. DCI answered by citing support CA gets from CIA noting separation would require duplication of support. He cited value of analysts getting close to operations and vice versa. He cited NIO system gathering in other agencies and reported he could see no benefit of separation of DDO.

40. Abshire noted that given current state of affairs, a change in organization would be misread and dysfunctional.



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42. In sum, three key points were:

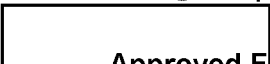
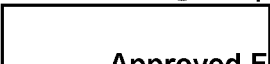
- a. Need to address issue in cover and properly support intelligence law.
- b. Need for legislation on sources and methods protection from violations by those within the secret.
- c. A split of CA from CIA or a split of DDO from CIA is not supportable.



Associate Deputy to the DCI
for the Intelligence Community

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Remarks:

Mr. Houston will raise this at the Morning Meeting tomorrow.

Executive/Secretary
16 October 1973
Date

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WELINGHUYSEN
DISTRICT, NEW JERSEY

COMMITTEE
FOREIGN AFFAIRS

KENT B. CRANE
ADMINISTRATIVE ASSISTANT

EXHIBIT 101

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ROOM 3
201/526-2867

Congress of the United States

House of Representatives

Washington, D.C. 20515

November 20, 1974

Noted by D.C.I.
11/21/74

The Honorable William Colby
Director
Central Intelligence Agency
Washington, D.C.

Dear Mr. Director:

Ambassador Murphy intends to convene the Commission's subcommittee on intelligence and national security again on December 2nd at the PFIAB Board Room. At that time, we would appreciate receiving a briefing on (a) the current organization of the intelligence community; (b) trends in resource management (including the implementation of the President's memorandum of November 5, 1971); and (c) budgetary review of the intelligence community.

We should like to set aside most of the morning for classified briefings. We are also inviting Admiral Anderson to provide any views he may have on these subjects and to especially review the executive branch oversight function, about which Commissioners have remaining questions.

At the same meeting we intend to consider unclassified papers on resource management by Mr. Macy, legal authorities by Mr. Harris, institutional framework of the community by Mr. Barnds, and several sections of the classified historical review prepared by Mr. Hitchcock and myself.

Kind personal regards.

Sincerely,

[Redacted Signature]

Kent B. Crane
Administrative Assistant

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November 30, 1974

The Hon. William E. Colby
Director of Central Intelligence
Langley, Virginia

Dear Mr. Colby:

Enclosed for your review, should you find it of interest, is a revised draft of the study, Legal Authority for the Conduct and Control of Foreign Intelligence Activities [prepared for the Commission on the Organization of the Government for the Conduct of Foreign Policy].

This study and the issues which it poses will be considered by the Murphy Commission at its next meetings on December 16-17, 1974, by which time comments from OGC/CIA, Professor Elliff of Brandeis, and the former General Counsel, Mr. Houston will be available for consideration by the Commission.

STAT When [] of the IC staff suggested that I discuss my study with you, I responded (last summer) that there was not then reason to consume your time. If you do have an opportunity to read the enclosed study and find that a discussion of issues therein raised would be helpful, I would be glad to come out from Washington at some time during the week of December 16-20. Because this study was prepared for the Murphy Commission and not the executive branch, there is no need for detailed consideration. On the other hand, elaborate review of proposed legislation to protect foreign intelligence sources and methods is probably overly complex for the Commission, but possibly helpful to the executive branch.

There are four issues which may well interest you; the first two relate to your duty to protect intelligence sources and methods; the third relates to your coordination duties vis à vis NSA; and the fourth poses the question as to whether formal legal opinions for covert action, by legitimating certain activities while inhibiting others, would be appropriate. Although my review of draft legislation to protect intelligence sources and methods is likely to elicit a plausible defense from OGC/CIA, there remains the more important policy issue as to whether statutory power of injunctive relief would really assist in fulfilment of your duties under 50 U.S.C.A. 8403(b)(3). [See the attached copy of a letter to Mr. Houston, dated November 30, 1974]. Secondly, there is the issue as to whether the legal status of technical collection systems is likely of amelioration.

The Hon. William E. Colby, Nov. 30, 1974, page 2.

Third, there is the issue as to whether Congressional legislation for NSA would be appropriate, either to legitimate transnational collection missions or to assure a communitywide responsiveness in lieu of a Defense-dominated clientele. Both the 1973 and 1974 reports of Leo Cherne, to PFIAB, have reinforced my view that new legislation for NSA would be appropriate. Should you be interested in this issue, it would be appropriate for me to make prior arrangements to transmit to your office copies of the brief summary [Appendix 3, Conf.] deleted per request of NSA from the unclassified text, and a more detailed and highly-classified supplement.

Fourth, the proposition that legal opinions would tend to legitimate greater covert action activity may be of interest. with whom I have discussed this matter, has suggested a meeting with Mr. Nelson. In the event that you would be interested in reviewing this subject with me, it would probably make sense for me to obtain reactions from Mr. Nelson and the OGC staff at an earlier meeting.

Lastly, I would like to note that my lack of satisfaction with various of the intelligence papers prepared for the Murphy Commission is not in any substantial way the consequence of any lack of cooperation on the part of the USIB-member agencies. On the contrary, all the agencies have been most cooperative, and the IC staff has been most helpful. Our intellectual deficiencies are self-imposed.

Very truly yours.

William R. Harris

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Enclosure as stated.

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November 30, 1974

Lawrence R. Houston, Esquire

Dear Mr. Houston:

Enclosed please find an updated set of Tabs [A-K, inclusive] which are part of Appendix 1 to the draft study, Legal Authority for the Conduct and Control of Foreign Intelligence Activities, October 30, 1974, revised November 22, 1974. These should be substituted for the Tabs which you should have previously received.

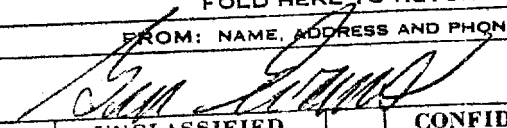
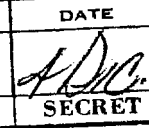
Summary analysis of the Department of Justice draft legislation of October 15, 1974 [Tabs H and K], found at Tabs I and J, suggests that the best working draft of intelligence sources and methods legislation remains the OGC/CIA draft of September 1974, found at Tab F. My substantial dissatisfaction with this legislation has been addressed at pp. 33-38 and in the introductory remarks of Appendix 1.

If the Beacon Theaters constraints are as significant as I believe they are likely to be, then the marginal protection afforded by statutory prescription of injunctive relief is likely to be slight -- scarcely an improvement, if any, beyond relief under rights of contract. The costs of this marginal increment of injunctive relief may include: (i) some probability, however remote, that the entire statute will fail on constitutional grounds; (ii) some probability that the federal judiciary will be less favorably disposed to enforcement of equitable relief when remedies at law (as with the British Official Secrets Act) are seen as increasingly adequate; (iii) the high probability that a proposal for injunctive relief by statute will serve as a lightning rod to attract Congressional opposition, hence reduce the probability of Congressional enactment; and (iv) the costs of "success," assuming that a gag statute is enacted, in reinforcing the view that much that CIA does must be sufficiently nefarious to require such extraordinary protection.

If my analysis is correct (and you may decide it is not), then there remains a tactically complex question as to whether the proposal for injunctive relief should be carried forward into the 94th Congress, so as to obtain credit for its abandonment as part of a legislative compromise, or whether the proposal is only an albatross which should be abandoned at the first polite opportunity, presumably in the interlude between the 93rd and 94th Congresses. Your comments on the many other issues raised in my study would be appreciated.

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William B. Harris

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